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Supreme Court, U. S.
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No. 99 135

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

JACKSON SECURITIES & INVESTMENT COMPANY,
a Corporation,
Petitioner,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

and

BRIEF AND ARGUMENT

Of Crampton Harris, Birmingham, Alabama,
in Support of Petition.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner (appellee in the Court below), Jackson Securities and Investment Company, a corporation (hereinafter referred to as Jackson), prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered on the twentieth day of February, 1947 and the opinion of the same date in support

thereof, on which a petition for rehearing was denied by said Court in an order dated March 19, 1947 without opinion.

A transcript of the record in the case, including the proceedings in said Court, is furnished herewith in accordance with the rules of this Court, which transcript is supplemented by original exhibits certified by the Clerk of the District Court to said United States Circuit Court of Appeals for the Fifth Circuit by order of the District Court and now certified to this Court.

JURISDICTION.

The jurisdiction of this Court is based on section 240 (a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the act of February 13, 1925.

SHORT STATEMENT OF THE MATTER INVOLVED.

This case involves the right of a real estate broker with an exclusive agency to be paid for his services in obtaining a satisfactory tenant. The owner would not complete negotiations with such tenant and negotiated a lease on its own account with a third party. This arbitrary disregard of the broker's rights set up a chain reaction which ran through various devices and manipulations by the owner and came to an end with the broker's tenant still in possession under a new lease from a so-called redemptioner controlled and directed by the owner both as to the making of such new lease and the terms thereof, the rents reducing Prudential's investment.

On appeal to the Circuit Court of Appeals, that Court reversed the judgment of the District Court in favor of the broker.

A copy of the opinion of the Circuit Court of Appeals is set forth in the appendix.

QUESTIONS PRESENTED.

The questions presented are:

1. Is the owner of real estate who enters into an exclusive leasing contract with a real estate broker under an obligation to act in good faith toward the broker?

2. Can a real estate owner avoid his obligation to pay for services rendered by an exclusive leasing broker by any intricate device or scheme whatsoever, which winds up with the broker's tenant in the premises under a new lease?

3. When a real estate broker and the owner of real estate enter into contracts having provisions with reference to "rights of redemption" and "sales," are the parties contracting about bona fide "redemption" and bona fide "sales"? Can the broker's rights to pay for his services be defeated by a fictitious or specious "redemption" or "sale" made in bad faith?

4. Does a broker with an exclusive leasing agency earn a commission when he obtains a satisfactory tenant?

5. Is it in accord with due process for a Circuit Court of Appeals to decide a question of local law directly contrary to the decisions of the highest court of the state?

6. Where the opinion of the Circuit Court of Appeals shows that the court has not applied the applicable local law and has also failed to grasp the nature of the different counts of the complaint and thereby worked an injustice, does that constitute a departure from the accepted and usual course of judicial proceedings so as to call for an exercise by the Supreme Court of its power of supervision?

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully submits that there exist special and important reasons for the granting of the writ of certiorari herein prayed for because:

1. The decision of the Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

2. The decision of the Circuit Court of Appeals constitutes a departure from the accepted and usual course of judicial proceedings in that the decision reveals a failure to grasp the questions presented by the pleadings and the evidence and shows such a state of confusion on the part of the court as to call for an exercise of the Supreme Court's power of supervision.

3. Parties to a contract mutually pledge one another cooperation and good faith. This pledge is implied as a matter of law. No Federal Court should remove this pledge and thereby lower the ethical standards which govern the transaction of business.

4. The Supreme Court in the exercise of its supervisory power over all Federal Courts, should see to it that no decision lowers the high ethical standards which the common law of the states has placed upon those doing business therein.

5. The decision of the Circuit Court of Appeals works an injustice in that it enables Prudential to use Jackson's services without paying Jackson any compensation therefor.

6. The decision of the Circuit Court of Appeals was in error because it used the owner's right to sell under a sales contract to avoid his obligation to pay for services already rendered under a separate leasing or management contract.

7. The decision of the Circuit Court of Appeals is wrong in that it treats two separate contracts, one entered into on November 28, 1939, and the other on April 22, 1937, as if they were one.

8. The decision of the Court of Appeals shows confusion as to the meaning of Counts 6, 7 and 8. They do not contain the allegations ascribed to them in the opinion.

STATEMENT.

Jackson's relation with Prudential began in 1909 (R. 189). The lease management agreement between them was executed in April, 1937 (R. 192, PX. 3). The management agreement contained these clauses:

> "2. The Prudential, by its president or vice president, hereby appoints and employs the manager as the exclusive managering agent for the Prudential of said properties described in schedule 'A' * * *
>
> "12. The manager shall use his best efforts to secure tenants for the properties listed in schedule 'A', through his own organization. * * * The manager further agrees to maintain an organization at all times sufficient to enable him to carry out the provisions of this paragraph * * *
>
> "21. * * * All leases in excess of one year the right to negotiate as to the amount of commission to be paid is reserved. * * *"

On January 10, 1941, Prudential acquired the premises involved by foreclosure of its mortgage (R. 466). The mortgage debt at foreclosure was about $325,000.00 (R. 533). Prudential's title was subject to a two year statutory right of redemption (Appendix, Title 7, Section 727, Code of Alabama, 1940). Upon foreclosure the property was listed with Jackson under schedule "A" of the management contract (R. 254).

The First Lease.

Prudential put the property in Jackson's hands in 1941 under the terms of the management contract. Jackson, working with another broker named Metcalf, produced a tenant, namely, the Darling Store (R. 260), and the leasing fee was paid by Prudential to Jackson and divided with Metcalf without objection (R. 261).

The first Darling Store lease expired December 31, 1943 and contained the following clause:

> "Nineteenth: The Landlord agrees to give Tenant the first opportunity to negotiate for the renewal of this lease, or in the event building is subdivided into two or more stores, for whatever space is desired; on a basis satisfactory to the Landlord, provided said negotiations are completed at least ninety (90) days prior to the expiration of this lease."

Negotiations for Renewal.

In September, 1943, Metcalf went with Cahill of Jackson's organization to New York to confer with Darling and obtain a proposition (R. 282, 283). Darling proposed a long term lease providing for a minimum annual rental of from eighteen to twenty thousand dollars with six percent of sales (R. 283). They returned to Birmingham and communicated Darling's proposition to Abernathy, Prudential's Birmingham Manager, who stated that he thought they could get a better deal out of Darling. Cahill asked Abernathy for a counter proposition that he would recommend and was then informed by Abernathy they were negotiating with another prospect. He would not give Cahill a counter proposition (R. 283).

Prudential's Private Deal With Ann Lewis.

In July or August, 1942 (R. 138), John Carr of Jemison Realty Company, a competitor of Jackson, went to Pru-

dential's office in Birmingham and asked Abernathy for permission to work on the property (R. 145). Abernathy consented and agreed with Carr on a cash commission of 2½ percent of a rental reserve if he produced a lease (R. 140, 141). Abernathy even went to New York with Carr in the first week of October, 1942, and while there they conferred with McGregor, an official of Prudential at Newark (R. 149). The negotiations finally resulted in the draft of a lease by Prudential's attorney which was signed by Ann Lewis Stores and mailed direct to the Home Office of Prudential (R. 150). This lease was submitted to the Finance Committee of Prudential on December 11th and was approved (PX. 12, R. 340). The lease to Ann Lewis contained the following proviso:

> "15. This lease is subject to the statutory right of redemption which expires January 10, 1943 * * *" (PX. 12, R. 340).

Prudential never submitted to Cahill any counter proposition. On the contrary, Abernathy told Cahill he was wasting his time going to New York (R. 286).

Jackson's Tenant, Darling Stores, Sues Prudential in New York and Alabama.

On November 17, 1944, Bilder, Darling's Newark Attorney, wrote Prudential calling their attention to clause 19 and accused Mr. Abernathy of avoiding them when they went to Birmingham to confer with him (PX. 15, R. 343). On November 30th Darling wired to Prudential:

> "We would like to offer for your consideration Twenty Six Thousand Dollar per year minimum rental for five or ten year lease against six percent of sales for Birmingham property have wired this offer to Abernathy" (PX. 17, R. 348).

This telegram evoked a memorandum for Mr. Robert L. McGregor, Supervisor of Prudential's Mortgage Loan Department, which contained the following:

> "* * * I believe this whole matter is fraught with danger because if Darling Stores could ever prove that they made an offer which was better than the Ann Lewis' offer, and we refused to accept the offer, undoubtedly under the terms of their lease, they could sue us for considerable damages. * * * It is my considered opinion, therefore, that within a very few days we must, in fairness to Darling Stores, give them our decision and I think the right decision is that—we will renew their lease" (PX. 17, R. 348).

On December 2nd Darling instituted suit against Prudential in the Circuit Court of Jefferson County, Alabama, Equity side, praying an injunction to prevent the leasing of the property to Ann Lewis (PX. 20, R. 354). On December 5th Darling instituted a similar suit in the Supreme Court of New York and a writ of injunction issued out of that Court and served upon Prudential on December 8th (PX. 24, R. 356). Notwithstanding these suits the Ann Lewis lease was presented to the Financial Committee on December 11th and was approved (PX. 27, R. 361).

Prudential Brings Darling and Nelson Together.

Nelson, representing the mortgagor in the foreclosure proceedings, came upon the scene in the middle of December (R. 507). He went to the Home Office of Prudential to effect redemption if he could. Captain Nelson testified that if Prudential had insisted upon its strict legal rights and demanded the $408,000.00 or $409,000.00 they could not have redeemed the property (R. 488).

Carrick, an attorney for Prudential, suggested to Nelson that he get in touch with Mr. Bilder, attorney for the Dar-

ling Stores, "with the idea that Darling Stores and the Nelson Estate might work together" (PX. 33, R. 365). About this time Carrick also wrote Abernathy:

> "* * * they are not at this point acting through the Nelson Estate, although in my telephone conversation with Mr. Bilder I have told him that we want the property redeemed" (PX. 37, R. 368).

There Was No Legal Redemption.

The full amount required to redeem as of January 1, 1943 was $408,949.63 (R. 364, PX. 30). Nelson, even with Darling's financial support, couldn't pay the full amount (R. 488). Prudential, therefore, desired to make concessions. On December 16th Carrick wired Robertson, Prudential's Birmingham lawyer:

> "Darling people considering redemption through deal with Nelson Estate. If, in order to protect ourselves against Ann Lewis, we insist on strict legal redemption, would your law permit any concession in favor of redemptioner in the matter of penalty interest?" (R. 364, PX 31.)

Robertson replied on the same day:

> "In my judgment 'strict legal redemption' means just what it says, and the redemption statutes call for and require a penalty interest at the rate of 10% per annum, and a 'strict legal redemption' could be on no other basis" (R. 364, PX. 32).

On December 16th Carrick wrote Abernathy:

> "* * * There still remains the over-all question mentioned in my previous letter, as to whether the Prudential will be entirely safe from Ann Lewis upon its selling the property under any such deal as the foregoing. It is more likely than not that the Nelson Estate cannot raise even the minimum $40,000 indicated above, but this same question is going to arise

> again when Darling Stores makes us some sort of an offer for less than the full amount due us on a strict legal redemption basis * * *" (R. 365, PX. 33).

Abernathy replied that he agreed with Robertson and that Prudential might be "subject to exposure" (R. 366, PX. 36).

In order to bring about a situation whereby Prudential could deliver a lease of the property through Nelson to Darling the amount required to redeem was reduced from $408,949.63 to $360,000.00. On December 24th Carrick wrote to Abernathy:

> "Mr. Rogers decided that we should hold the property available for redemption at the figure of $360,000. This 'redemption' must be by the Nelson Estate and that will force the Darling people to do business with Captain Nelson. * * *
>
> "At the same time that I am mailing this letter to Captain Nelson, I am telephoning the $360,000 figure to Mr. Bilder" (R. 378, PX. 39).

The cold calculation with which Prudential manipulated circumstances and forced the reluctant Nelson to do business with Darling is revealed in Carrick's letter of December 31 to Abernathy:

> "As I size the matter up, Captain Nelson will be squeezed by the Darling people if the cash needed is in excess of the $25,000 he can himself raise. It appears to me that he is making a desperate effort to avoid putting himself in their power. * * * I believe that our being firm will force him to come to terms with them quickly and then we will have something offered us before January 10th. If we should show weakness, in my opinion it would delay the showdown between Captain Nelson and the Darling people" (R. 378, PX. 40).

In the end the extremes to which Prudential went is graphically portrayed in the letter of Carrick to Robertson which is shown beginning at page 379 of the record and is Plaintiff's Exhibit 42. That letter reveals that Prudential finally agreed to accept and did accept $340,793.00. This acceptance was extraordinary in that it reserved $3,500.00 to pay attorneys' fees for defending the Darling suits; $1,500.00 to "salve" the broker on the Ann Lewis lease. This letter also takes up the dating of documents which did not correspond with the reality. It shows that Prudential was to give the Nelson Estate a quitclaim deed and to take back from it a note and mortgage for $310,000.00. This remarkable letter contains this language just before the end thereof:

> "The deal between Darling and Nelson is rather complicated, but it is necessary that we should go into it, because Darling, which is putting up the money on Nelson's behalf, is looking to us for some protection. The new lease is to be subordinate to our mortgage. The landlord's interest is to be assigned to the Prudential, and we are going to be expected to actually receive the rent—which protects Darling from Nelson's possibly diverting the money to some other purpose than the carrying of this property."

An Illustration of Hypocrisy.

The manner in which Prudential covered itself up with words while manipulating its devices in ruthless fashion is illustrated in the resolution of the Financial Committee relative to the interest rate in Alabama on redemption. That resolution reads:

> "We avoid taking the unconscionable interest rate permitted by the Alabama Statute" (R. 382, PX. 47).

This noble pronouncement provoked the following reply from Prudential's Birmingham Title Attorney:

> "The Finance Committee approval makes reference to '* * * the unconscionable interest rate permitted by the Alabama Statute.' This 10% penalty law has been on the Statutes of the State of Alabama since Clay's Digest of 1843 and was incorporated as Section 2118 of the first Code of Alabama in 1852 and became a law by act of Legislature on January 1, 1842. It has not since been changed. Are we to consider this as a precedent and discontinue the charging of the statutory penalty in future redemptions? We have never before waived it" (R. 384, PX. 50).

The pretense of redemption within the statutory period appears more clearly when it is noted that this strange "redemption" was on the receipt of a "tender" merely accompanied by a check from Darling for $30,000.00. The Financial Committee of Prudential did not approve it until January 14th (PX. 47, R. 382). The instruments of conveyance are dated January 9, 1943, but as to Exhibit 52 (R. 386) the acknowledgment is dated January 26, 1943, and the mortgage back to Prudential which is dated January 9 bears acknowledgment dated March 5, 1943 (R. 389, PX. 56).

Nelson Must Submit New Lease to Darling to Prudential for Approval.

The attorneys for Darling drafted the lease and submitted it to Carrick, the attorney for Prudential. On January 18 Carrick wrote: "I will go over the draft of the lease prepared by Mr. Dorman at my first opportunity" (R. 381).

Verdict for Jackson in the Sum of $3,625.00.

The Court of Appeals reversed the judgment for Jackson in the sum of $3,625.00. This judgment was based on Jackson's rights under his management agreement. The

evidence showed that the cash value of the broker's services on executing a lease is not less than 2½ percent of the rent reserved (R. 143). The rent reserved in the first term certain of the Darling lease aggregates $153,600.00 (R. 292), so that a proper verdict and judgment should have been not less than $3,840.00.

It is respectfully submitted that, for the reasons stated, the petition for writ of certiorari should be granted.

.....

CRAMPTON HARRIS,
Birmingham, Alabama.

State of Alabama, }
Jefferson County. } ss.

Crampton Harris, being first duly sworn, deposes and says that he is attorney for petitioner above named; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

.....

Subscribed and sworn to before me this.....day of June, 1947.

.....

Notary Public.

State of Alabama,
Jefferson County. } ss.

I, Crampton Harris, attorney at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for writ of certiorari; that the same is not made for purposes of delay and that in my opinion, said petition is meritorious and well founded in law and ought to be granted and the writ issued.

I further certify that I have personally given notice of the filing of the petition, together with a copy of the petition, supporting brief and printed record by serving copies thereof on Mr. Francis H. Hare, counsel for respondent.

.....

Crampton Harris.

BRIEF AND ARGUMENT
Of Crampton Harris of Birmingham, Alabama, in Support of Foregoing Petition.

I.

The decision of the Circuit Court of Appeals neither holds the owner to the good faith required of him by the law of Alabama, nor does it recognize the right of a real estate broker to commissions upon obtaining a satisfactory tenant as construed by the Supreme Court of Alabama.

A.

The fundamental rule of the common law is stated in the first edition of Williston's Treatise on Contracts, Section 1318, as follows:

> "In any case where the plaintiff's performance requires the cooperation of the defendant, as in a contract to serve or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this cooperation and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day. So in a contract of life insurance a promise on the part of the company to accept the premiums is clearly implied in fact and a refusal to receive premiums is an immediate breach of contract. Indeed, it seems that there is generally in a conditional contract an implied promise not to prevent performance of the condition."

The Supreme Court of Alabama, in the case of World's Exposition Shows v. B. P. O. Elks, 237 Ala. 329 (186 Sou. 521), say:

> "The chief difficulty with defendant lies in the fact that the argument against plaintiff's recovery of this guaranteed amount must rest upon the failure of defendant to perform its contract. Or, to state it other-

wise, plaintiff must be denied the recovery of the guaranteed one thousand dollars because of defendant's breach of the contract. Such a conclusion runs counter to a well settled principle of law, as stated in 3 Williston on Contracts, section 677, and very generally recognized by the authorities, as follows: 'It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.' "

The Supreme Court of Alabama in the case of Ackley & Co. v. Hunter, Benn & Co.'s Co., 166 Ala. 295 (51 Sou. 964), uses language especially apt in the decision of this case:

> "All contracts are presumed to intend good faith on the part of the contractors, and the evident purpose of the provision requiring deliveries as fast as water will permit and timber is gotten is that, as soon as the timber can be gotten out, and assembled in such quantities as are usually shipped together, the same shall be delivered. Of course, the party selling the timber must be allowed some discretion, in consulting his own convenience as to the quantities to be shipped at one time; but any manipulation of the deliveries for the purpose of working a fraud on the other party will be rebuked by the court."

When Jackson's representative went to Prudential's representative in September, 1942, with an offer from Darling it was the duty of Prudential to negotiate. Prudential could not, by refusing to negotiate, make it impossible for Jackson to perform his contract. The Supreme Court of Alabama has spoken upon this matter in the case of Gulf Trading Co. v. Radcliff, 216 Ala. 645 (114 So. 308):

"The owner is under the duty of good faith in all dealings with his agent. Hence it is well settled that, if he obstructs or hinders the agent in concluding the negotiations within the time limit by avoiding interviews with the agent or customer by encouraging the buyer to delay his purchase, or any other device, and thereafter, acting directly or through another, he closes the deal with the customer procured by the agent on as good, or even less favorable, terms, commissions are due the agent. Likewise, if, pending negotiations, he fraudulently revokes the agency, or partially revokes the same by reducing the time, depriving the agent of the opportunity to earn commissions, and, taking advantage of the agent's services, he closes with his client, commissions are due."

When a new lease was executed whereby Darling continued in possession of the premises, this new lease conclusively demonstrated that Darling was a satisfactory tenant. The owner cannot go ahead and deal with the prospective tenant, obtained by the broker, and wind up the negotiations with a lease to such tenant, without being liable to pay the broker his commission.

The Supreme Court of Alabama makes remarks that are very pertinent to this case in the case of Garnet v. Gunn, 206 Ala. 471 (91 So. 382), in which it is said:

"The contract between the parties to this cause not having been performed according to its terms, and plaintiff having no exclusive right in the premises, defendant had the right, without reference to plaintiff or his claim, to deal in good faith with his property on any terms that did not involve any appropriation of the benefit of what plaintiff had done in the way of procuring a purchaser.

" * * * And if defendant, without definite and bona fide interruption, continued the negotiation with his vendee, into the way of which he had been put by plaintiff, and thus accepted the benefit of plaintiff's

services, but arrived at a trade radically different from that originally contemplated by the parties, he would be answerable to plaintiff in a quantum meruit."

B.

Where an agent has an exclusive agency to lease, even the owner, by making the lease direct, cannot defeat the agent's right to a commission. The Supreme Court of Alabama has decided this point in the case of Erswell v. Ford, 211 Ala. 242 (100 So. 96). In that case the owner, Erswell, had contracted with Ford, the broker, as follows:

> "From this date until December 31, 1922 I appoint you my agent, and give you the exclusive right to handle all my rentals and sales on a commission basis of 2½ per cent, on my Birmingham property * * *."

On September 10, 1919 Erswell executed what amounted to a contract to convey the property to a purchaser on or before January 23, 1923 subject to be defeated by certain conditions. On September 18, 1919 Ford sued Erswell for a breach of the exclusive contract. The defendant contended that the option had not been exercised; that no deed had been delivered; that the contract had not been executed. Rejecting this contention and sustaining the suit, the court said:

> "It is to be noted that this contract to convey (subject to be defeated by conditions) was made to expire only a few days after the contract Mrs. Erswell had theretofore made with Ford. Looking to the substance rather than the form, as should have been done in the decree, the trial court held that the bill was not prematurely filed on September 18, 1919. And such was the fact. When the contract of September 10, 1919, was entered into the breach of contract existed."

Thus Jackson's cause of action ripened when the Ann Lewis lease was made irrespective of whether it was ever performed by the parties.

II.

The opinion of the Circuit Court of Appeals does not mention a single decision of the Supreme Court of Alabama. Strange to say, the opinion does not cite a single case from any jurisdiction, even its own.

Since the decision of this court in Erie Railroad Co. v. Tompkins, 304 U. S. 64, the local law has been of vital importance in the Federal Courts. Those Courts cannot make local law. They merely apply the local law as given them in the opinions of the Supreme Court of the particular state.

Whenever a Federal Court decides a question of purely local law in utter disregard of that law, is not that Court depriving the litigant of due process under the 5th Amendment? We respectfully submit that the Court in this case should grant the writ of certiorari, apply the local law and reverse and render the cause.

Has the Court of Appeals, in the instant case, given a decision on the questions involved? Is not this situation covered by the language of this Court in Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257? We refer to the following:

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of the opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

In that case this Court said:

> "• • • the judgment of the Circuit Court of Appeals must be reversed and the case be remanded to that court to the end that the duty to hear and decide it may be performed."

If it is a violation of the Fifth Amendment to condemn a man's property without due process of law by force of a judgment in which the error is gross and obvious, is it not likewise a violation of the due-process clause to take away a man's recovery by a judgment in which the error is gross and obvious?

Is it not clear that the Circuit Court of Appeals by its complete disregard of applicable decisions of the Supreme Court of Alabama has failed to act in accordance with the standards of proper procedure? We refer this court to the opinion in Duke Power Co. v. Greenwood Co., 299 U. S. 259, in which this language is used:

> "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."

III.

The opinion of the Court of Appeals shows clearly that the Court did not distinguish between the different counts to which the judgment for $3,625.00 was referred. The Court's confusion is distressing in its treatment of counts

6, 7 and 8. They were the common counts and sought recovery on a quantum meruit. The Court imputes nonexistent allegations as to those counts.

The Court treats counts 3 and 9 as if they were one and the same. Count 3 proceeds on the theory the plaintiff had obtained a lease and was thereby entitled to pay, while 9 proceeds on the theory that Prudential breached its exclusive contract with Jackson and negotiated itself a lease with a third party.

IV.

The opinion of the Circuit Court of Appeals is contrary to the Alabama law in its treatment of the sales contract entered into on November 28, 1939 and the management or leasing contract entered into on April 22, 1937 as one. These contracts relate to different things. They are not to be construed together if the Alabama law is followed. In the case of Norville v. Lowenstein, 233 Ala. 249 (171 So. 357) the Supreme Court of Alabama holds:

> "A written contract made at a remote time, in another and separate transaction, cannot be incorporated into a subsequent written contract without some reference to that effect."

Even though the sales agreement entered into more than two years subsequent to the leasing agreement should be considered as one with the leasing agreement, that would not defeat Jackson's right of recovery. Jackson had rendered his service in obtaining a satisfactory tenant prior to January 11, 1943 when the purported redemption was dated.

It is a familiar rule of law that fraud is never presumed. Business men, when entering into a contract, are presumed to be contracting about realities. They are not engaged in shams and subterfuges in the vast majority of cases. Hence

when the sale of property took that property out of Exhibit "A" the sale had in mind was a real sale. A sale carries with it dominion over the thing sold. Prudential retained dominion to the extent of a veto on any lease by the dummy grantee, the selection of a tenant by the dummy grantee and the receipt of the rents to reduce its investment.

V.

The great Judah P. Benjamin in 1859 argued a similar case before this Court. He said:

> "This case is a very simple one. Emmerling, a real estate broker, was employed by Kock to find a purchaser for his plantation at the price of $250,000. A purchaser was found by the broker, with whom the bargain was made by Kock at the price fixed by himself. After making a verbal agreement for the sale, Kock changed his mind, and refused to sell. The question is, whether he can lawfully refuse to pay his broker the commission earned, on the ground that the sale was not actually effected, when it was his own act that prevented the accomplishment of the sale.
>
> "The judge below decided rightly that the commissions were due."

See Kock v. Emmerling, 63 U. S. 69.

Respectfully submitted,

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CRAMPTON HARRIS.

APPENDIX

Title 7, Section 727, Code of Alabama 1940:

Redemption by debtor et als.—Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in the circuit court, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee, vendee of the debtor, or assignee of the equity or statutory right of redemption, wife, widow, child, heir at law, devisee, or any vendee or assignee of the right of redemption under this Code, from the purchaser, or his vendee, within two years thereafter in the manner provided in this chapter.